

(1983) 03 AHC CK 0033
In the Allahabad High Court
Case No : F.A.F.O. No. 455 of 1981

Sita Ram Giri and Others

APPELLANT

Vs

M/s Badri Prasad Radhey Shyam

RESPONDENT

Date of Decision : 01-03-1983

Acts Referred:

Arbitration Act, 1940 — Section 14(2), 30, 39
Limitation Act, 1963 — Article 119, 158

Citation : (1983) 03 AHC CK 0033

Hon'ble Judges : O.P. Saxena, J;K.C. Agrawal, J

Bench : Division Bench

Advocate : B.N. Misra, for the Appellant;

Final Decision : Allowed

Judgement

K.C. Agrawal, J.—This appeal u/s 39 of the Arbitration Act has been preferred by the three Appellants, namely, Sita Ram Giri, Mahendra Bharti and Ramji Jaiswal, against the judgment of the Civil Judge, Allahabad dated 18-3-1981, dismissing the two objections-one filed by Appellant No. 1 and the other filed by Appellants 2 and 3 u/s 30 of the Arbitration Act.

2. For deciding the controversy involved in this appeal, it is not necessary to mention the facts in its entirety. It may suffice to mention that the Appellants and Respondent No. 1 entered into a contract under which certain amount of money was advanced by Respondent No. 1. According to Respondent No. 1, at the time of loaning an agreement was executed between the parties. Clause 6 of the agreement in this case entitled one of the parties to refer the matter to the arbitrator on his own without taking consent of the other. The agreement provided that if the matter was referred to the arbitrator by one of the parties, the other party would be deemed to have consented to the same. It appears that Respondent No. 1 took the matter to the arbitrator on the basis of the aforesaid Clause 6 of the agreement. The arbitrator gave the award on 3-2-1976, and filed the same, thereafter, in the court. On 26-2-1977, the award was made a Rule of

the court.

3. Sira Ram Giri, Appellant No. 1, moved an application for setting aside the order of the court below making the award a Rule of the Court on the ground that the proceedings being behind his back and without any notice, they were liable to be recalled. On similar lines, the Appellants 2 and 3 filed another application. Both of these applications were contested by the Respondent not 1. The main plea was that as the Appellants had knowledge of the proceedings before the court, the application for setting aside was not maintainable. By an order dated 28th April, 1980, the Civil Judge allowed the application, and set aside the order making the award a Rule of the Court.

4. The Appellant No. 1, thereafter, filed objection u/s 30 of the Arbitration Act asserting inter alia that the award was initiated on account of the misconduct of the arbitrator. He also alleged that he was not given any notice by the arbitrator. Appellants 2 and 3 filed another objection u/s 30 on the same ground.

5. On the pleadings of parties, the Civil Judge framed three issues which were as under:

1. Whether award was improperly procured, as alleged in para 3(f) of the objection of O. P. No. 2 or is otherwise invalid, as alleged in para 3(g)?

2. Whether the reference is unilateral? If so, its effect?

3. Whether objections filed by O.P. No. 1 and 3 had no notice of arbitration proceedings? If so its effect?

6. All the three issues were decided by the learned Civil Judge against the Appellants and the objections filed by them u/s 30 were rejected. Being aggrieved, the Appellants have come to this Court.

7. One of the issues which arose before the learned Civil Judge and still arises for decision before us is about limitation.

8. The award had been given by the arbitrator on 3-2-1976 which had been made a Rule of Court on 26-2-1977. It was, therefore, that the Appellants made two applications for setting aside the award which was set aside on the 28th April, 1980. The Appellant No. 1 filed objection u/s 30 within thirty days of the order dated 2F-4-80. Similarly, objections by Appellants 2 and 3 had also been preferred within that period. The ground that was made on behalf of the Respondent was that objection u/s 30 could be filed within thirty days of the service of the notice of the award by the court and that Appellants should be deemed to have received notice of the award in April 1979 when they moved for setting aside the order making it a Rule of the Court. We find ourselves unable to agree. Article 119 of the Limitation Act which is relevant for this purpose, reads as under:

* * *

9. Under this Article, period of thirty days starts running from the date of service of notice of the filing of the award. It may be noted here that Section 14(2) of the Arbitration Act also requires service of notice of the award after it was filed by the arbitrator. Taking into account the service of notice required by Sub-section (2) of Section 14 that Article 119 of the Limitation Act provided for limitation of thirty days from service. In this case, the case of Respondent No. 1 was that a notice had been served on the three Appellants but there is no evidence on record which could lead to the conclusion in favour of Respondent No. 1 on this point. It is precisely on this ground that the exparte award dated 26-2-77 had been set aside by the Civil Judge on 28-4-80. As the service had not been made, Article 119 did not apply.

10. In Smt. Maheshwari Devi and Others Vs. State of Bihar and Others, , the Supreme Court held that as there was no proof that notice of filing of the award into the court was given to the Defendant, the objection by the Defendant to the award could not be rejected on the ground of limitation. It also held that knowledge of arbitration proceedings before the arbitrator was immaterial. We find full support for the view taken by us from the above decision. Notices of the proceedings before the court on the basis of filing of the award had not been served. No evidence worthy reliance was brought on record that any of the Appellants had knowledge of the same.

11. Sri. V. D. Singh, counsel for the Respondents, contended before us that the Appellants since admittedly had knowledge of the award when they applied for setting aside the decree making it a Rule of the Court, limitation should be computed from the date mentioned by them in the affidavits filed for the said purpose. For this proposition, the learned Counsel sought support from the decision of the Supreme Court reported in 1962 SC page 666. In this connection, counsel also urged that after the decree had been set aside on 28-4-80, the Appellants were required to explain each day's delay and as there was no adequate explanation for the delay, the objection filed on 19th May, 1980 were liable to be dismissed on the ground of limitation. We are unable to agree. We have pointed out above that the Appellants could not have filed objections u/s 30 so long as the decree making a Rule of the Court had been set aside. The Supreme Court's judgment relied upon turned on its facts. There is nothing in this judgment which supports the Respondents on the controversy arising for decision before us. So far as the explanation of delay is concerned, we may mention that after the award had been set aside, the Appellants were bound to take some reasonable time to file the objections. If the counsel for the Respondent was right in his submission, the Appellants could not be even entitled to one day's time for this purpose.

12. That apart, there is another aspect which is required to be highlighted. The same is about the incapacity of the Appellant to file the objection. After the award was filed in the court on 3-2-1976, it was made a Rule of the Court on 26-2-1977. So long as the exparte decree passed behind the back of the

Appellants existed, there was no occasion for them to file objection u/s 30 of the Arbitration Act. An objection u/s 30 of the Arbitration Act is filed to the award and not to the decree which is made a Rule of the Court in pursuance of the same. Accordingly, it was legally not possible for the Appellants to have filed objections to the award dated 3-2-76. The award had merged and become a decree after it was made a Rule of the Court. This *ex parte* decree making it a rule of the Court was set aside on 28th April, 1980. It is only after this date that the Appellant, could file objections. To the period during which an objection should have been filed, we can legitimately think that rule of thirty days should be applied to. We have already noted above that in that event, Article 119 of the Limitation Act would not be applicable, inasmuch as the notice of filing of the award had not been served on the Appellants. In a position in which the Appellants had been placed, they could not file the objections earlier. In *J. R. Mills v. Dwarika Prasad* 1964 ALJ 724 the learned Single Judge of this Court was called upon to consider more or less the similar controversy. The learned Judge held that when the Court, on the application of the party, sets aside an *ex parte* decree based on an award in arbitration proceedings to award, the limitation Under Article 158 of the Limitation Act for filing the objection does not commence, when the application is filed but when the *ex parte* decree is set aside. We are in respectful agreement with the view of the learned Judge. It may be noted that Article 158 of the old Limitation Act is equivalent to Article 119 of the new Limitation Act. To us, therefore, it appears that the court below erred grossly in holding that the objection of the Appellants were barred by time.

13. The only other controversy that subsists for decision is whether the award was illegal and was liable to be set aside. On this controversy, the court below had framed an issue. The same was whether Appellants 1 to 3 have no notice of the arbitration proceedings.

14. Radhey Shyam, Respondent No. 1 had filed a counter affidavit before the court below alleging that the arbitrator sent notices to all the Appellants by registered post. Out of the three Appellants, Sita Ram Giri, Appellant No. 1, had been personally served and was represented by Sri. M. L. Gupta Advocate before the arbitrator. The court below accepted the counter affidavit filed by Respondent No. 1 and held that the Appellant No. 1 had been personally served.

15. So far as the other two Appellants, namely, Mahendra Bharti and Ramji Jaiswal, are concerned, the court below has not recorded any finding about service of notices by the arbitrator on them. These two Appellants had, however, denied the service of the notices as well as that they had any knowledge of the arbitration proceedings. Instead of giving any finding on this controversy the court relied upon certain documents which had been filed by Radhey Shyam along with his counter affidavit for showing that these two Appellants had agreed to the appointment of Kashinath Advocate as the arbitrator. These were the photostate copies of the original letters alleged to have been sent by Appellants 2 and 3 agreeing to appoint Sri. Kashinath Advocate as arbitrator. These

Appellants denied their signatures on these letters and also asserted that they had never agreed to the appointment of Sri. Kashinath Advocate as arbitrator.

16. Admittedly, the original letters, the copies of which had been filed along with the counter affidavit by Radhey Shyam, were not produced in the court. In the absence of the original letters, the court below was not justified in holding on the basis of the photostate copies that the Appellants 2 and 3 had agreed to the appointment of Sri. KashiNath Advocate as arbitrator. The photostate copies were not conclusive of the controversy. There was no presumption attached them about their correctness. When the sending of these letters had been denied by Appellants 2 and 3, the proper course for the court below was to direct Respondent No. 1 to produce the original letters. In the absence of the original letters, it was not possible for the court below and so also for us to arrive at any finding in favour of the Respondents.

17. The court below erroneously compared the signatures made on the photostate copies with the admitted signatures of Appellants 2 and 3 and incorrectly found that they tallied with each other. The photostate copies of the letters filed by Respondent No. 1 were not conclusive of the controversy. Although it is permissible for the court to compare the hand writing, it is generally recognized to be hazardous test and should not be resorted to except in clearest case without an aid of the expert.

18. So far as Appellant No. 1 is concerned, the court below did not record any concluded finding whether he had participated in the proceedings before the arbitrator.

19. For all these reasons, the appeal succeeds and is allowed. The judgment of the court below is set aside and the court below is directed to decide the case de novo after affording opportunity to the parties to lead evidence. In the circumstances, we direct that the Appellants would be entitled to get costs of this appeal from Respondent No. 1.